NO. 3179

United States Circuit Court of Appeals

For the Ninth Circuit

SCHENK & McDONALD, a Co-partnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS,
a Corporation,

Defendant in Error.

Brief for Plaintiffs in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

JOHN RUSTGARD,
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BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

This cause comes up to this tribunal on a writ of error from a judgment entered in the District Court of Alaska, Division Number One, at Juneau, and in which cause these plaintiffs in error were defendants.

The action was instituted by defendant in

error to recover the sum of $1900.03 as balance upon an open account (Tr. p. 2).

Plaintiffs in error answering, first denied there was anything due on the account, and as a further defense alleged that the balance was in their favor in the amount of $1517.16 (Tr. p. 4).

In addition to these defenses, plaintiffs in error set up five separate counter-claims.

The first counter-claim is for balance in the sum of $697.20 for logs sold and delivered in 1916 (Tr. p. 5).

The second counter-claim is for the sum of $860.00 claimed to be due for use of tow boat and crew. (Tr. p. 5).

The third counter-claim is for the sum of $757.46 claimed to be due for saw logs sold in 1917 (Tr. pp. 5, 6).

The fourth counter-claim is for the sum of $238.50 claimed to be due for boom chains and piling chains loaned to defendant in error.

The fifth counter-claim is for the sum of $27.00 claimed to be due for labor furnished defendant in error.

The first and third counter-claims were taken from the jury by the Court in his instructions, upon the ground, as claimed by the Court, that there was no evidence in the case to warrant a recovery under the allegations of those counter-claims.

By special and separate verdict of the jury,

termed special findings of facts, the second, fourth and fifth counter-claims were decided in favor of plaintiffs in error, but the general verdict was in favor of defendant in error, to the extent of $838.53, the difference between the sum asked for by defendant in error in its complaint and the findings of the jury in favor of plaintiffs in error on the second, fourth and fifth counter-claims (Tr. p. 133). The special findings by the jury were not sent up with the original records, but were subsequently certified to this Court, and are attached to the transcript printed.

Costs were taxed at $1128.17 by the Clerk (Tr. p. 139).

The Court's ruling removed from the jury all questions of fact arising under the complaint and answer as well as under the first and third counter-claims.

The records before the Court deal only with those features of the pleadings and exclude all reference to second, fourth and fifth counter-claims.

At the time of the trial, defendant in error filed a bill of particular items which it claims constitutes the account sued upon. In this account plaintiffs in error are credited with four rafts of logs aggregating 1,302,360 ft. at $6.00 per thousand, or $7,814.16 for the year 1916.

The same account credits plaintiffs in error with ten rafts of logs in 1917 aggregating 2,359,005

feet at $6.50 per thousand, or a total of $15,333.55 for that year. Against these credit items are charged various items for moneys paid plaintiffs in error or paid on their behalf to the Government direct for stumpage (Tr. p. 11).

The only dispute arises over the measurement of the logs. The same questions—the measurement of the logs—arises under the issues formed by the complaint and answer as well as by the first and third counter-claims and the reply.

According to the scale of the government rangers, plaintiffs in error furnished 1,406,109 ft. in 1916, while defendant in error claims that only 1,302,360 ft. were furnished—a difference of 103,830 ft.

According to the government scale, 2,680,080 ft. were delivered in 1917, while defendant in error claims that only 2,359,005 ft. were delivered—a difference of 321,075 ft. in 1917, or a total difference of 427,905 feet.

If the government scale be declared legal by this Court, and the jury's verdict on the second, fourth and fifth counter-claims be accepted, there is a difference between the contentions of these litigants of $3,771.47, and the general verdict should have been in favor of these plaintiffs in error to the amount of $1,871.44 instead of for defendant in error to the extent of $838.53

While the complaint properly alleges but one

open account, the evidence shows that the transactions between the parties may in reality and conveniently be considered under two separate groups, viz., the transactions for 1916, and the transactions for 1917.

The records show that plaintiffs in error were loggers, operating south of Petersburg, which latter is a small town about 110 miles south of Juneau, in Alaska. The defendant in error was a corporation operating a sawmill at Juneau.

In March, 1916, the parties entered into a written contract whereby the loggers agreed to furnish to the mill company 1,000,000 feet, more or less, of saw logs from the north end of Prince of Wales Island, some 170 miles south of Juneau, at $6.00 per thousand (Ex. A. p. 124).

The defendant in error now claims that the logs furnished in 1916 were delivered under this contract, while plaintiffs in error dispute that claim. Whether the logs were delivered under that contract or not is of very little importance at this time. No logs were furnished from Prince of Wales Island, but were furnished from various other places at the same price stated in the written contract.

On January 4, 1917, the parties entered into another contract (Ex. D. p. 127), under which it is agreed all the deliveries were made in 1917. The price for that year was $6.50. Four booms were

delivered in 1916, and ten booms in 1917.

At the trial the mill company showed that it had the booms scaled at or near the mill by one John Stevenson, an employe of the company (Tr. pp. 17, 21), and that this scale was as set out in the bill of particulars (Tr. p. 17). At the trial the loggers showed they had the logs scaled by the United States forest rangers and offered to show that each raft was much larger than the Stevenson scale allowed. These offers were rejected by the Court upon the theory that by the contracts the loggers bound themselves to accept the "mill scale," and the Court held that the Stevenson scale must be considered to be the "mill scale." These rulings are all assigned as errors (Tr. Assgnmt. VI-XIII, pp. 147-149). Both contracts were typewritten upon printed forms made for and supplied by the mill company. The 1916 contract was prepared in Juneau by the manager of the company, H. S. Worthen, and mailed to the loggers at Petersburg. In the records the typewritten portions of the original are distinguished by being underscored (See bottom page 130).

The originals have been transmitted to this Court for inspection.

The printed form contains the provision that "the said first party (the loggers) agrees to accept mill scale."

There are various other parts of the contract

in conflict with the last quoted provision, but especial attention is now directed to the following clauses which are in typewriting in the 1916 contract:

"Each boom of logs shall be scaled by the party of the first part and this scale shall be sent to the party of the second part for the purpose of comparison with number of pieces in boom." (Tr. pp. 126, 127);

and

"That in case of dispute over scale, the scale of a competent disinterested person shall be accepted as final by both parties."

The corresponding typewritten part in the contract of 1917 reads as follows:

"That in case of dispute over scale, the scale of a competent disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery." (Tr. p. 130).

On the trial, plaintiffs in error offered to show that Gordon D. McDonald, who represented the loggers in all their transactions, was not sure what was meant by the term "mill scale" and that at the time the contract of 1917 was entered into Worthen explained it to him. This offer was ruled out, and is assigned as error.

Plaintiffs in error then offered to prove that in the forestry service the term "mill scale" meant

"tally behind the saw." This was rejected, and that ruling is assigned as error.

The Court ruled that plaintiffs in error might prove what the term "mill scale" meant but no evidence on this point satisfactory to the Court was offered or received. The Court, however, in absence of any evidence as to the meaning of the term in question, held that it meant the Stevenson scale.

The chief contentions of plaintiffs in error touching the question of construction of the contracts, are as follows:

1. That the typewritten clause providing for settlement of dispute over scale by a disinterested person, abrogates or annuls the printed clause purporting to obligate the logger to be bound by "mill scale."

2. That if the contract be construed to leave it with one of the parties to the contract to decide incontrovertibly what the logs scale and what is due the logger, the contract is void as unilateral and unconscionable.

3. That if the printed portion be held controlling, the contract is unilateral for the reason that only one of the parties (not both) is bound by the "mill scale." The language is "said *first* party agrees to accept the mill scale." Nothing is said about the acceptance of the "mill scale" by the second party.

4. That "mill scale" is a technical term which

requires evidence to interpret, and in absence of such evidence no meaning can be placed upon it by the Court.

5. That the Court in absence of evidence erred in interpreting "mill scale" to mean whatever scale the mill man sees fit to allow.

6. That even if the foregoing contention be not justified, the Court erred in rejecting the loggers' offer to prove the government scale, for the reason that the great discrepancy in the scale, together with various circumstantial evidence tend to show the Stevenson scale was fraudulent or the result of gross mistake.

The Court also erred in taxing as cost the sum of $1,066.17 as marshal's fees, consisting, so far as can be learned, of expenses connected with the levying of a certain attachment to secure a future judgment.

The objection to this taxation is, First, that there was no certificate of such fees filed as required by the Code; Second, the expense of executing an attachment cannot be lawfully made a part of the personal judgment, but can be collected only out of the property attached. If the property attached proves insufficient to pay the cost of the attachment, no personal liability for an officer's extravagance can be placed upon the judgment debtor.

It will be asked of this Court that the judg-

ment be reversed and that a new trial be had upon the issues formed by the complaint and answer and by the first and third counter-claims and the reply, and that the special findings of facts of the jury on the second, fourth and fifth counter-claims stand as a judgment of the Court.

ARGUMENT

—A—

THE DELIVERIES OF 1916

Attention has already been directed to the fact that the complaint sets up no contract, but simply alleges there is a balance of $1900.03 due the plaintiff below on an open and running account and for which judgment is asked.

The Bill of Particulars filed by the mill company during the trial divides the transactions between the parties into two groups: One for 1916, and one for 1917.

On the 1916 transaction the Bill of Particulars credits the loggers with four rafts, as follows:

Portage Bay raft	148,060 ft.
Port Malmsburry raft	343,480 ft.
Port Malmsburry raft	397,770 ft.
Duncan Canal raft	413,050 ft.

Total—1,302,360 ft. at $6.00—$7,814.16.

Both parties agreed that these rafts were delivered by plaintiffs in error and received by defendants in error, but the dispute arose over the contents of the "Duncan Canal raft." Plaintiffs in error offered to prove that this raft contained 516,680 feet instead of only 413,050 feet, as admitted by the defendant in error. Objection to this offer was sustained by the Court and all rulings to that offer are assigned as error. (Tr. pp. 81, 91, 93, 96, 101, 102). This evidence was material both under the general issue and the first counter-claim.

The grounds for the objection of defendant in error and the Court's ruling were, in substance, that the logs were delivered under the contract introduced in evidence by defendant in error as "Plaintiff's Exhibit A" (Tr. pp. 13, 124) which, so it is argued by the mill company, binds the loggers to accept "mill scale," whatever that means.

Plaintiffs in error insist:

First, that no logs were delivered under the terms of "Exhibit A", that this contract was abandoned, and that the logs were delivered pursuant to an oral contract entered into subsequent to the execution of "Exhibit A."

Second, that "Exhibit A" does not bind plaintiffs in error to accept "mill scale," but that the true scale must prevail.

Third, that the evidence offered and excluded,

together with other evidence in the case, tends to show the alleged "mill scale" fraudulent.

I.

WERE THE 1916 DELIVERIES MADE UNDER THE WRITTEN CONTRACT?

The evidence shows that all the timber in question is cut on the United States Forest Reserve under the rules and regulations of the Forestry Bureau. Under these rules, of which the Court takes judicial notice, the timber is purchased in small lots at an agreed price per thousand feet, board measure.

It appears that McDonald thought he knew of some valuable timber on the North end of Prince of Wales Island and in that neighborhood and informed Worthen of that fact (Tr. p. 74; Plaintiff's Exhibit "S", Tr. p. 131). The negotiations resulted in a contract to cut a clump of timber on Prince of Wales Island, about 175 miles from Juneau. The contract of March 27, 1916, was executed accordingly.

But when Mr. McDonald personally examined the timber in question, he found it undesirable for Worthen's purposes and did not buy or bid on it (Tr. p. 74). Of this fact Worthen was informed. Subsequently the mill company's captain came to McDonald at Portage Bay, close to Wrangell Narrows and more than sixty-five miles from Prince

of Wales Island, and informed McDonald that the mill company was in great need of logs and begged to let him have a small raft then in the water at Portage Bay. This was granted after permission was obtained from the party for whom the raft had been cut (Tr. p. 76). In the same manner special negotiations were had for the delivery of other rafts in 1916 (Tr. p. 76). These facts, together with the facts that the contract called for a specific tract of timber, that it limits the cut to one million feet while the deliveries here were, according to the loggers' and the Government's count, 1,406,190 feet, and the further fact that the contract is expressly "not assignable by either party," are sufficient to make it a question for the jury as to whether the contract of 1916 had been abandoned or abrogated, at least in part. If this was a question for the jury, then plaintiffs in error had the right to prove the actual amount of logs delivered, irrespective of what the written abandoned or modified contract said with reference to "mill scale."

It is now argued, however, that there is no evidence of any agreement as to price of timber delivered, except so far as shown by the written contract, and that, therefore, no evidence of quantity is material except under that contract. To this may be answered:

First. The evidence was material under the

general issue, which involves only the balance of the account. Under that issue there was nothing in dispute between the parties except the quantity of logs delivered. Worthen had testified to the items of the account on which the suit was brought (Tr. p. 15). Plaintiffs in error offered to show that the credit items were wrong—that for the "Duncan Canal Raft" they should have been credited with 516,680 feet instead of only with 413,050 feet. The price allowed by defendant in error, both in the Bill of Particulars and in the Worthen testimony, was accepted as correct and uncontroverted.

Second. The evidence was competent under the first counter-claim. There was no need for the loggers proving the price agreed on because that price had been admitted in the Bill of Particulars and was not disputed, and had been testified to by Mr. Worthen. Why prove what was conceded throughout the trial?

No doubt the jury had a right to find that the written contract had been abandoned in whole, as well as in part, and if this had been their conclusion, it is undisputed that Government scale would be competent evidence of quantity.

At no time during the trial was the loggers' evidence of the quantity of logs objected to on the ground that there was no evidence of price. That was an afterthought. The Court correctly stated

that the Bill of Particulars was a part of the pleadings (Tr. pp. 111, 112).

II.

THE CONTRACT OF 1916 *DOES NOT BIND THE LOGGERS TO ACCEPT THE "MILL SCALE".*

But even under the written contract of 1916 the Government scale was competent, both under the general issue and the first counter-claim. This raises the question of construction of the contract. It is an elementary canon of construction that a contract, if ambiguous, is construed most strongly against the party who prepared it.

> "It is a well settled rule of construction that words will be construed most strongly against the party who used them, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the presumption that his words mean one thing while he hopes the Court will adopt the construction by which they will mean another thing more to his advantage."
>
> 9 Cyc. 590.

It is also elementary that where a contract is prepared on printed blanks and there is a conflict between the written portions and the printed portions, the former must prevail.

> 9 Cyc. 584.

This contract was prepared by Worthen at

Juneau and mailed to McDonald at Petersburg (Tr. p. 18). The printed blanks were obviously prepared by or for the mill company, for this blank form recites that party of the second part is "a corporation duly organized and existing under the laws of the State of Washington," that the logs shall be ready for towing at a place "not to exceed ..... miles distant from the mill at Juneau of the said company." that the first party shall notify the second party "at its place of business in Juneau," and, finally, that the contract is signed "at Juneau, District of Alaska."

Therefore, if there are any ambiguities, they must be resolved against the mill company.

The printed part provides that "first party agrees to accept mill scale."

Considering this clause separately and as unaffected by the written portions, it is void because it is unilateral. It does not provide that the second party shall also be bound by the "mill scale." The company reserves for itself the right to accept or reject the "mill scale" and then undertakes to bind the first party, whenever it is to the company's advantage to do so; but whenever it is to the company's disadvantage to apply the "mill scale," the right to disregard it is reserved by the mill company.

This clause is so framed as to raise a suspic-

ion of intent to take unconscionable advantage of the logger.

The Court below seemed to take the position that the expression in question was intended to mean that the company reserves for itself the right to be the sole and binding arbiter of the measurement of the logs delivered. If that be the case, the contract is still void as unilateral and unconscionable.

In building contracts and kindred documents, it has become customary to appoint the architect, though employed by the owner, as arbiter of disputes over specifications and measurements, but in such cases he is not a party to the controversy and not interested in the result. But even a building contract which provides that disputes shall be determined by the owner is void.

In *Board of Commissioners v. Gibbon*, the case arose over a building contract which provided:

> "If any dispute shall arise as to the true construction of the contract or as to what is extra work, the matter shall be determined by the architect and the Board, and their decision shall be final and conclusive."

The Court said:

> "It is sufficient to say that the plain reason why such provisions will not be enforced is that the law will not permit a party making a contract to provide that he shall arbitrate

his own case and that his decision shall be final and conclusive."

Board of Commissioners v. Gibson, 63 N. E. 982 (987, 8).

The Supreme Court of the State of Washington held that where the architect had given a bond that the cost should not exceed a certain sum, he became himself so interested in the contract that he was incapacitated from acting as an arbitrator and the contract to make him sole arbiter was, to the extent of such agreement, void. In that behalf the Court said:

> "It is an ancient maxim, applicable to arbitrators as well as judges of Courts, that no man ought to be a judge in his own cause. The cause of the county became, by reason of this bond, the cause of the architects and the liability assumed by them made it to their interest to decide every question affecting the cost of this building against the claim of the contractor. Bias and prejudice would always be implied where such conditions exist and it was not necessary for the contractor to show that the architects' decisions were unjust or partial in order to relieve himself of their conclusive effect, even if it be a fact that he had no knowledge of the bond at the time he entered into the agreement making them so."

Long v. Pierce County, 61 Pac. 142 (151).

See also, *Supreme Council, etc. v. Forsinger*, 9 L. R. A. 501.

In conflict with the printed clause of the contract above quoted is the following appearing in typewriting:

> "Each boom of logs shall be scaled by the party of the first part and this scale shall be sent to the party of the second part for purpose of comparison with number of pieces in boom."

and

> "That in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties."

(Tr. pp. 126, 127).

Only a highly trained and keenly intelligent mind can discover any way of harmonizing this written clause with the printed clause above quoted. To the ordinary mind, this contract means that the true scale shall prevail and, in case of dispute about the true scale, a disinterested person shall be selected to scale the logs for both parties.

The Court and counsel argued that it was up to the loggers to start a dispute before the logs were sawed up and, inasmuch as they failed to do so, they forfeited their right to have a disinterested person scale the logs.

But plaintiffs in error had already scaled the logs. This was done by a disinterested person—the United States Forest Ranger—and, for all that appears, this scale was furnished to the mill company. At any rate, the scale by the ranger is a

matter of public record and will be furnished to anybody, on demand.

The Court will not give a statute, or a contract, or any written document, a cruel or unusual construction unless the language is so clear that no other construction can be given. Even if it were lawful to do so, the Court would not hold that authority was delegated to one of the parties to a contract to sit as judge in his own case unless the language of the document left no other alternative.

III

THE REASON FOR THE COURT'S RULING SET OUT IN THE INSTRUCTIONS TO THE JURY

An entirely new reason for excluding the Government scale of the "Duncan Canal Raft" appears in Section IV. of the Court's instructions (Tr. pp. 112-113). The Court says, in substance:

> "It is absolutely immaterial in this case about the question of how much were delivered under the contract and the amount due thereunder. I say that has nothing to do with the case now because the Bill of Particulars shows that whatever logs were delivered under that contract have been fully paid for, with the exceptionof $74.42."

Yes, that is shown by the Bill of Particulars and also by the Worthen testimony, but are these loggers bound by that testimony and that Bill of

Particulars? They offered to show that those statements were incorrect, offered to prove that the Bill of Particulars did not show all the logs delivered, offered to prove that the credit items were not as large as they ought to have been, offered to prove that the balance for 1916 was very much more in favor of the plaintiffs in error.

That was the general issue.

But the Court argues that plaintiffs in error cannot prove that there was a large credit in their favor for the 1916 transaction for the reason that the mill company had eliminated the 1916 transaction from the account by filing a Bill of Particulars during the course of the trial, to-wit, on March 16, 1918.

The logic of the Court's position is in substance and effect, that a party suing for the balance on an open account may, by dividing the account into monthly or yearly periods, eliminate all the periods in which the balances are in favor of defendant and recover on the accounts for those periods which show a balance in favor of the plaintiff, and may do so by filing an itemized Bill of Particulars during the trial.

The evidence of plaintiffs in error would show a balance in their favor for the 1916 transactions of some $1500.00, more or less. The Court argues that this makes no difference because the mill company did not sue for anything for that year.

But the company did set up a general account for both years in one. The Bill of Particulars, which was filed after the trial had commenced, as well as the tesimony of Mr. Worthen, covers both years. The loggers deny the balance against them. That is the general issue on which they were brought into Court. To come now and refuse to allow the loggers to prove the credit items because no suit is brought except upon the debit items seems rather an unfair position.

There is nothing in the record to indicate that these ideas had occurred to Court or counsel until after the evidence was all closed. Neither are these ideas given to the jury except for the purpose of explaining why they must find for the company on the general issue. Exceptions were taken to these instructions (Tr. pp. 119-121).

IV.

THE EVIDENCE ADMISSIBLE UNDER THE FIRST COUNTER-CLAIM

But even if the Court's logic be accepted as correct, it can apply only to the general issue. Independent of this issue, the evidence as to the true contents of the "Duncan Canal Raft" was certainly admissible under the first counter-claim, but this seems to have been overlooked by the Court. (Tr. pp. 96, 97, 102 Assgts. VI. VII. VIII.)

—B—

THE CONTRACT OF 1917

It is agreed that the deliveries for 1917 were made under the contract of January 4, 1917 (Plaintiff's Exhibit "D"; Tr. p. 127). There is no dispute over the number of rafts, nor over the price, nor over the payments. The only dispute arises over the number of feet in each raft. The loggers offered to prove by the Government scaler what the actual measurement of each raft was. This was ruled out by the Court on the theory that the loggers were bound by the "mill scale." (Tr. pp. 82-83, 99-100; Assignments IX, X and XI.

The correctness of the Court's ruling depends upon the construction to be given the written contract. The contract of 1917 differs from the written contract of 1916, though this seems to have been overlooked by the Court below. The last contract, like the first, is prepared on the company's blank forms, with the same printed proviso that the loggers "agree to accept mill scale," but in typewriting appears the following:

> "That in case of dispute over scale the scale of a competent, disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery." (Tr. p. 130).

Plaintiffs in error take the position that the proviso binding them to accept "mill scale" is void

for the reason already discussed in paragraph II., Ch. A., and for the further reason that even were this not so, the written provisions above quoted override the printed clause on the same subject.

9 Cyc. 584.

These features, too, have already been discussed in part.

The Court below took the position that this written proviso becomes operative only in case of dispute, and that it puts the burden on the loggers to start a dispute within thirty days after delivery of the logs. The Court's argument is as follows:

> "I cannot see how that means anything but this: The logs shall be scaled at the mill and the result shall be accepted, and payment shall be made inside of 30 days unless within that time there is a dispute. Put the shoe on the other foot. Suppose a lot of logs were delivered at a mill and the mill scaler scales them and they amount to 500,000 feet more than are really in the boom. Suppose the Government scaler had scaled those logs before they had got to the mill and he found that there were 500,000 feet less than the mill scale shows it, but the mill man pays for those logs according to his scale—does not discover that there is anything wrong at all—does not dispute his own scale, and pays for them. The 30 days elapse and there is no dispute of any kind. Do you think the millman could go back to the logger and make him rebate the difference? The logger would say, 'you paid me ac-

cording to your scale?' 'Yes,' 'What right have you to come back on me? That was my contract.'"

(Tr. pp. 82, 83.)

This is, at best, a most strained and technical, as well as an unusual, construction which would never occur to laymen, who alone in this case were concerned, and will be discussed more at length later in this brief.

At the time this document (Plaintiff's Exhibit "D") was signed, Mr. McDonald was in Juneau trying to get a settlement for the 1916 deliveries. For the purpose of determining what was in the minds of the parties at the time the 1917 contract was signed, it should be remembered that the mill company admits it was behind $74.42, while plaintiffs in error claim the company was in arrears more than $600.00 on logs alone, and a still larger sum for towing and labor. It was evidently for the purpose of fixing a time limit within which payments would have to be made that the clause requiring payment in full within thirty days was inserted, and not for the purpose of fixing a time limit within which to start trouble.

But other clauses of this contract, as well as the practical construction given it by both parties, render the position of the lower Court untenable.

It is provided in the contract:

"Said logs shall be considered delivered

> when, and in such amounts as, taken in tow by the tug-boat of said second party."

and that this was to be done at Portage Bay, "110 miles distant from the mill at Juneau of the said company."

After the logs were delivered at that place, they were the absolute property of the mill company. The latter might then sell the logs and it might lose them on the way. The danger connected with the towing of logs through the waters of Alaska is notorious. If the loggers were bound by "mill scale" they were obviously bound to depend upon the safe and certain conveyance of the logs to Juneau. Worthen himself testified that loss of logs and even of whole rafts were nothing uncommon.

(Tr. p. 71).

THE PRACTICAL CONSTRUCTION OF THE PARTIES.

In the case at bar, it never occurred to either of the parties to give to the document in question the construction which has been placed upon it by the learned Court below. But this practical construction is of the greatest aid to the Court in determining the intent of the parties on the subject and their view of their own contract.

"Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the Court in giving effect to its provisions. And the subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked to by the Court, and in some cases may be controlling."

9 Cyc. 588.

"A so-called written contract between parties is, in a sense, not their contract. It is rather the evidence of their agreement that is back of the contract. For that reason it must be an exceptional case where the practical construction that the parties have given to a contract of doubtful import will not control the Courts in interpreting it."

Board of Commissioners v. Gibson, 63 N. E. 982 (987).

If the Court's construction of the contract were correct, it would obviously be the duty of Worthen to take the logs to the mill and hold them thirty days after "mill scale," so as to give the loggers a chance to disagree and call for a disinterested scaler. But this was never thought of by Worthen nor by McDonald. Here is the statement of Worthen:

"Mr. Rustgard (to Mr. Worthen).—I was going to inquire from you in regard to your testimony. I think it was to the effect that in 1917 you were short of logs, and you sawed

them up just as fast as you got them. That was your testimony, wasn't it?

Mr. Worthen.—I don't recall being asked that, but that was pretty nearly the fact.

(Questions by the Court).

Q. Where are all these logs now?

A. Cut up and distributed.

Q. When were they cut up?

A. Last summer.

Q. The last boom under the 1917 contract was scaled July 15th, was it not?

A. I think something like that.

Q. Now, when was the timber sawed into lumber—when did it go through the mill?

A. You mean the exact date?

Q. No, approximately. What was the custom when the logs would come in?

A. It depends on how many we have on hand. If we have a lot of logs we take them up into the upper bay—

Q. What is the average?

A. The average—sometimes it is a week; sometimes it is six months.

Q. Have you no recollection about these logs?

A. I think these logs were finally all sawed up before the first of September.

Q. Have you no recollection as to when you received the last raft on July 15th what had become of the logs before that?

A. With the exception of that one boom they had been sawed up during the summer; we had one boom up on the tide flats at Price's Point."

(Tr. pp. 106 107).

And before that, in regard to scaling Worthen testified:

"The rafts are usually scaled as soon as they come in here to the mill. Sometimes they lay for a month or six weeks and sometimes they are put in the upper bay and lay there *three months* before they are scaled by my men. I have the record of only one of the rafts scaled in 1916; of the records of the last boom. I did not have the time when the first booms were scaled. There is nothing on the records to show by whom they were scaled—only that I remember it. * * * We did not always enter the scale in the books as soon as he gave us the scale. I usually kept it in my desk. They were not always entered in the books. The last boom in 1916 was entered at the time it was scaled, September 22nd, I think it was. That is the boom from Duncan Canal."

(Tr. p. 19).

It is obvious that the thirty day limitation for starting a dispute and calling in another scaler had never been in Worthen's mind. It was too abstruse to filter into him, even during counsel's clever argument. The point is too refined to be laid hold of by the rough hand of a layman.

What was the practical view taken of this proviso by McDonald?

"Q. Mr. McDonald, after the logs or rafts were delivered to the towboat 'Carrita', of the plaintiff company, you don't know whether they reached the mill or not?

A. I do not.

Q. Under the contract they were his when he hooked on to them?

A. That was the agreement.

Q. Now, then, did you ever ask him for a statement of an accounting before this suit was brought?

A. We asked him for a statement at the time we came up here to settle for the year's business of 1916.

Q. And after that time did you ask him for any statement of the account for 1917?

A. Yes, we asked him at that time for a statement covering also 1917.

The Court: What time was that, Mr. McDonald?

A. That was at the time the dispute arose, and we had not received any scale at that time or any other time.

The Court: What time was it that you asked him for a statement on the 1917 contract?

A. It was in the latter part of August, along about the 20th or 25th, somewhere along the last part—couldn't say the exact date.

The Court: That was the first dispute you had?

A. That was the first—the first time we ever received a statement or a scale from the Worthen mills. He had never issued any statement of his scale or anything about it."

(Tr. pp. 87, 88).

"Q. You don't know anything about whether that is the raft that Stevenson scaled?

A. I know nothing about it after it leaves my presence. They were to be delivered under the agreement when he hooked on to them.

The Court: Where were they to be delivered under your agreement?

A. They were to be accepted at the camp and they are no more our logs when he hooks

on to them. That is the rule everywhere in regard to any timber—or at least it is the customary rule.

The Court: That being the case, the logs are delivered when the tug boat takes them—the logs are delivered down there?

Mr. Rustgard: They become Worthern's property that moment.

The Court: Very, well, proceed.

Q. You didn't come to Juneau at all and you don't know what happened here?

A. I don't know anything about it.

Q. You paid no more attention to any of these rafts after they hooked on to them?

A. Nothing."

(Tr. p. 95.)

Worthen knew that this was the construction placed upon the agreement by McDonald, for the latter never asked for a scale from Worthen, but Worthen did ask for the scale of the foresters. (Tr. p. 80).

Again, behold the absurdity resulting from the Court's construction: If the logger had thirty days in which to start trouble, and the mill company had thirty days, and no more, in which to pay, the latter would be forced to wait to the last minute of the thirty days before paying or a dispute might start after payment. The thirty day clause, under that construction, would operate to prevent payment within the thirty days.

In this connection, it may be stated that the

contract provides that the logs shall be cut "under the terms and conditions required by the Forest Service regulations," which means, *inter alias*, that they must be scaled by the Government before they leave the camp.

With this rule Worthen was conversant, for all timber in Southeastern Alaska is within the Forest Reserve. He knew, too, that the stumpage was paid for according to this scale. He himself paid that stumpage and charged it to the loggers (Tr. p. 16; Bill of Particulars, p. 10), and he knew that McDonald never inquired about the "mill scale'" He knew McDonald paid no attention to the logs after they were delivered. Worthen himself, and not McDonald, had a chance to know what the difference was between the "mill scale" and the Government scale which McDonald had to follow. If the mill company was dissatisfied with the Government scale, it was Worthen's duty, if anybody's, to call McDonald's attention to the fact and call in a third scaler to settle the dispute.

This seems the natural construction for a layman to adopt and the contract in question was designed by and for laymen, not for hairsplitting lawyers.

Worthen admitted, as has been shown, that most of the logs were cut as soon as they came to the mill, and that others were not scaled by him for three months after their arrival. He admits

that if he needed the logs when they arrived at the mill he would have cut them up immediately. That the thirty day period was fixed as the limit within which the logger could accept or reject the "mill scale" never occurred to him.

THE COURT'S ARGUMENT.

The Court's argument in support of its ruling on the contract for 1917 has already been quoted. This argument is plausible and, unless it is examined in detail, may be misleading.

In the first place, it overlooks vital facts and, in the second place, overlooks vital principles of law.

It ignores the practical construction placed upon the contract by both parties prior to the trial, as heretofore pointed out. It ignores the fact that the thirty day clause was inserted, not as a limitation for starting disputes, but as a time limitation for payment. It ignores the fact that the mill company paid no heed to the thirty day limitation, but sometimes sawed the logs as soon as they came to the mill, and sometimes did not scale them for months after they were received. It ignores many of the other provisions of the contract which are in conflict with the Court's interpretation.

Moreover, the Court erroneously and without evidence assumes that "mill scale" means any scale made by the mill man or under his direction and,

in addition, assumes there is no difference in legal status between an executed and an executory contract.

The Court's own illustration led the learned Court into error. The Court said, in substance:

> "Suppose the mill man made an error of 500,000 feet in the scale of a raft, and suppose, before discovery of the error, he paid according to that scale, could he recover?"

The learned Court's answer is "No." From this he draws the conclusion that the contract, after its execution, being binding upon the mill man, it must, before execution, be binding upon the logger. The learned Court's logic carries him into the error of holding that it is perfectly lawful for a party to act as judge in his own case because, if perchance he should erroneously decide against himself, he would not be in position to complain after entry of judgment.

Let the logic of the learned Court be analyzed a little further. Suppose the mill scaler made an error in his scale and it was discovered before payment. What would happen? The mill owner would simply reduce the scale to what he was willing to allow. If the Court's view of the contract is correct, that would be the mill man's privilege. He is the sole arbiter of what to pay. The burden of starting the dispute is not on him. Would the logger have to stand for this kind of a deal?

But suppose that the contract had been fully executed and the money paid, can the mill man come into court and complain that he overpaid the logger under a mistake of facts and seek to recover what was erroneously paid? In answer, the following principles of law are submitted:

First. A party who insisted on sitting in judgment on his own case is not in position to complain that he rendered a decree too favorable to his antagonist.

Second. A party who has fully executed a contract will not be heard to complain that the contract was void.

Third. A party who has fully executed a contract will not be heard to complain that the contract was so much too favorable to himself as to be unilateral.

Fourth. A party who, due to mistake of facts, has paid money under a legal contract may recover, as fraud or mistake vitiates any transaction.

The propositions referred to in this chapter have been discussed in detail in the other parts of this brief. They are repeated at this time for the sole purpose of applying them to the learned Court's argument submitted at the time of the trial.

—C—

MEANING OF "MILL SCALE"

The term "mill scale" is a technical term and

it is therefore proper to show its meaning by oral evidence.

16 Cyc. 875.

The Court ruled that plaintiffs in error were entitled to show by oral evidence the meaning of the term in question. (Tr. pp. 84, 85.)

This is tantamount to holding that the term is a technical phrase of the meaning of which the Court does not take judicial notice.

No evidence was adduced showing the meaning. Under the circumstances, the Court had no right to impute to the term any meaning whatever. Nevertheless, the Court evidently accepted counsel's statement or contention as to the meaning of the term "mill scale" as true and correct, for the Court's ruling is based on the assumption that counsel's contention as to its meaning is correct.

McDonald testified that he did not know what the term "mill scale" meant (Tr. p. 84) and had never seen it used until he saw it in these contracts. For this reason he discussed the meaning of this phrase with Worthen at the time the 1917 contract was signed and offered to testify to what Worthen then explained that the term meant, but this testimony was excluded by the Court, which ruling is assigned as error (Tr. p. 85; Assignments II. III, IV, and V., Tr. p. 147). It may well be conceded that if it had been shown that the term

has a well defined meaning, oral evidence of any agreement as to its meaning is in the nature of varying the terms of a written instrument. But where, as in this case, it is not shown that the term has any definite meaning, and especially where, as here, it is proven affirmatively that the meaning is uncertain, oral evidence as to the meaning agreed upon by the parties at the time of signing the contract is only for the purpose of explaining the patent ambiguity by extrinsic evidence and cannot be said to be an attempt to vary the terms of a written instrument.

17 Cyc. 682, 685.

> "Parole or extrinsic evidence of the understanding of the parties in respect to the construction of a written instrument may be given to explain that which would otherwise be ambiguious, and for this purpose evidence of declarations of a party made to or at the time of signing the contract is admissible."

17 Cyc. 675.

Mr. McDonald having testified that he could not state that the term in question had any definite, well understood meaning and having been refused the right to testify what Worthen at the time of signing the contract explained the term to mean, Supervising United States Forester, Mr. G. W. Weigle, testified that the term "mill scale" was

frequently used in the Forestry Service where it had a well defined meaning, but the Court ruled that the meaning of the term in that field was incompetent as evidence (Tr. pp. 103, 104; Assignments XIII, XIV, and XV, pp. 149, 150). Plaintiffs in error then offered to prove that in the Forestry Service the term "mill scale" means the tally of the lumber after the logs are run through the mill,—"the tally behind the saw" (Tr. p. 145). This was also objected to and the objection sustained, which ruling is also assigned as error (Assignment XV, Tr. pp. 149, 150).

There can be no doubt that the Bureau of Forestry aims to employ words and phrases in the sense they are usually employed throughout the country. No one will doubt that if the phrase in question was used in a contract between the logger and the Bureau of Forestry, or between the mill company and the Bureau of Forestry, Mr. Weigle's testimony would have been competent. Now, when that same logger and that same mill company use the same term in a contract between themselves concerning the same logs, would it be presumed that this term then has a different meaning?

Until the contrary be shown, it should be permissible to presume that the meaning of the term "mill scale" in the Forestry Service is the universal or accepted meaning in the trades dealing with saw logs, because that is the special field of the Bureau.

And if it was incumbent upon the Court, in absence of evidence, to decide what was the meaning of the term "mill scale," it should have been ruled that the term meant "tally behind the saw," for that is the holding of the higher tribunals.

Rowe v. Chicago Lumber & Coal Co., 24 So. 235.

It must not be overlooked that if this be the meaning of the term in the printed blank, it is clearly abrogated by the typewritten clauses which call for a scale by a disinterested party—obviously before sawing.

There is, then, absolutely no chance for harmonizing the printed clauses with the typewritten clauses and the former must be held to have been abrogated by the latter.

—D—

EVIDENCE ON GOVERNMENT SCALE WOULD SHOW GROSS ERROR OR FRAUD IN THE STEVENSON SCALE

The evidence shows that the mill company had the logs scaled by one of its employees, John Stevenson (Tr. p. 15). This man did not know who had cut the logs or where the rafts came from (Tr. p. 41).

"Q. How do you know it came from Schenk and McDonald?

A. I don't know.

Q. You don't know?

A. I don't know.

Q. Where was the second boom you scaled in 1917 when you scaled it?

A. It was laying in the same place.

Q. How do you know that came from Schenk and McDonald?

A. I don't know it.

Q. Do you remember where the third boom was when you scaled it in 1917?

A. Yes.

Q. Where was it?

A. It was up the bay here tied to some pilings up in the log pond here.

Q. How do you know that came from Schenk and McDonald?

A. I couldn't swear that it did."

(Tr. pp. 41, 42).

Mr. Worthen made an effort to prove that the rafts scaled by Stevenson came from Schenk and McDonald, but evidently he knew no more about it than Stevenson.

Q. You were not on the boat when the tug hooked on to the rafts to tow them up here?

A. No. I was not.

Q. Were you here always when your tug came in with a raft?

A. They might have come in with one or two rafts when I was not here; I was out to the Westward about a week; the rest of the

season I was except about a week, from Monday to Friday, I was out."

(Tr. p. 69).

"Q. Didn't your men lose some logs out of a boom they got from McDonald?

A. Not that I know of. Of course I don't know what transpires on the water any further than what they report when they get here.

Q. Didn't you testify in this Court on the injunction proceeding that you knew of one raft where your men lost half a dozen sticks?

A. I don't recall it now.

Q. Did I ask you this question on that examination: "And that is all that has been delivered under this contract? A. Yes, sir. I would like to add by way of explanation that in one of those booms there were five logs lost out of the peak coming up, for which, in looking over the books, I discovered there had been no allowance made to Mr. McDonald'—did you so testify?

A. I might have—I don't recall it at this moment.

Q. For all you know there might have been several logs lost?

A. They might have lost them all for all I know, but they got here with some—I wasn't out on the boat on a single trip.

Q. Under the contract the logs were yours when you hooked on to them at Portage Bay?

A. That is what the contract says."

(Tr. pp. 71-72).

Whether the scales which Stevenson turned in were of Schenk & McDonald's rafts or not is

not shown by any competent evidence. Much less does it appear that the rafts when scaled by Stevenson contained all the logs delivered by plaintiffs in error. Moreover, all the testimony of Stevenson is set out in the Bill of Exceptions and shows for itself that this man is shifty and unreliable and not very intelligent. His testimony is such that, standing alone, it throws doubt upon his fairness and intelligence as a scaler.

But the trial court stood this proposition on its head. While it seemed to plaintiffs in error that it was up to the Mill company to prove that the logs which Stevenson scaled were the logs and all the logs which the plaintiffs in error delivered, the Court put the burden upon the loggers to prove that some of the logs had been lost or that Stevenson scaled the wrong raft. Said the Court:

> "I permit the defendants to show that the logs delivered to Worthen under this contract were not the logs that Worthen had scaled at the mill." (Tr. p. 93).

Even if all that counsel claim for the contracts be conceded the burden is still on defendant in error to prove that its scale was of the logs delivered and of all of them; and this proof may be controverted by such evidence as the case is susceptible of.

If it were conceded that the contracts call for the acceptance of the Stevenson scale and that that

feature of the contract is valid, and it be also conceded his scale was of all the logs delivered, it must also be conceded that his scale cannot be attacked except for fraud, for gross error or mathematical error. But the discrepancy between the Government and the Stevenson scale is such as to prove *ipso facto* either fraud or gross mistake in calculation or that the wrong rafts were scaled.

The counting of the logs and their measurements are mathematical problems which involve no appreciable exercise of judgment. Only the estimate of defects and their deduction from the gross involves skill. Stevenson's evidence shows what he found to be the gross scale, i. e., the exact measurement of each raft, and also shows the amount of his deductions for defects, but these same records also show that the Government scale, after deducting defects, exceeds the gross scale or measurements by Stevenson.

Referring to the "Duncan Canal Raft," as an example, Stevenson testified it measured 451,520 feet in gross, 38,470 feet in deductions, leaving a net scale of 413,050 feet (Tr. pp. 26, 27). The Government found that this raft, even after deductions for defects, contained 516,680 feet (Tr. p. 97; Assignment VIII, Tr. p. 148) or 65,160 feet more than the gross total found by Stevenson. What the Government's gross scale and deductions amounted to does not appear, but that is immaterial for the purpose of this inquiry.

This marked difference in the mere matter of measurement is not due to a difference in judgment.

These facts go to show that Stevenson either scaled the wrong rafts or some logs had been lost from it before it reached the mill, or he had made some radical errors in his measurements or in his calculations.

It is interesting to note that the original notes of the scale had been lost (Tr. pp. 25, 26). At this time the offer to prove the Government scale was made, counsel for plaintiffs in error stated:

> "I submit to the Court, and I want it in the record, that at the present time there is nothing tangible to show that the raft which was surveyed or scaled by Mr. Stevenson is the raft which Mr. McDonald delivered to Worthen. I will state to the Court that I shall prove that the difference between the true scaled contents of the raft and the scale testified to by Mr. Stevenson is so great that either it proves that it was not the same raft or else there was a fraudulent scaling. That the difference in the gross scale as well as in the lineal feet is so great as to prove fraud."
>
> (Tr. p. 92).

In view of all the circumstances above recited, it was a question for the jury to decide whether the Stevenson scale was fraudulent or the result of gross error. The jury might well find that Stevenson scaled the wrong raft or that he missed some of the logs or that there was fraud.

The situation with reference to the 1917 rafts —ten in number—is exactly the same as the "Duncan Canal Raft." In each case we have both the gross and the net scale of Stevenson, as well as the gross and net scale of the Government, and in each case the net scale of the Government very much exceeds the gross scale of Stevenson, except in two rafts (Tr. pp. 28-37, 100; Assignments IX and X., Tr. p. 148).

Now, in conclusion, it is obvious that had the jury found that the Government scale was correct, it would have found that there was no balance due the mill company, but that on the account of logs alone, there was a balance due the loggers in the sum of $1517.16, as alleged. Moreover, the jury would have found in favor of plaintiffs in error, both on the first and the third counter-claims, the first being for logs delivered in 1916, and the third for logs delivered in 1917. Under the rulings of the Court both of these counter-claims were taken away from the jury for want of evidence to support them. (Tr. p. 121).

—E—

THE COSTS

The costs, as taxed by the Clerk of the Court against plaintiffs in error, amount to $1128.17.

Of this amount, the sum of $1066.17 is the Marshal's fees.

Plaintiffs in error object that this amount of Marshal's fees is illegally taxed as part of the judgment, except to the amount of $99.16.

The grounds for the objection are as follows:

1. At the time the Bill of Costs was filed, there was no certificate by the Marshal on record showing what his fees were over and above $99.16.

2. After objection was filed, such certificate was filed, but the time for so doing had expired, and the certificate showed the fees objected to consisted of expenses of the Marshal in taking care of property attached by defendant in error, and are therefore not taxable against plaintiffs in error personally, but can be paid only out of the property levied upon.

Section 1348, Compiled Laws of Alaska, provides:

> "Sec. 1348. Costs and disbursements shall be taxed and allowed by the Clerk. No disbursments shall be allowed any party unless he shall file with the Clerk within five days from the entry of judgment a statement of the same, which statement must be verified except as to fees of officers. A statement of disbursments may be filed with the Clerk at any time after five days, but in such case a copy thereof must be served upon the adverse party. A disbursement which a party is entitled to recover must be taxed, whether the

same has been paid or not by such party. The statement of disbursements thus filed, and costs, shall be allowed of course unless the adverse party, within two days from the time allowed to file the same, shall file his objections thereto, stating the particulars of such objections."

Section 1349, Compiled Laws of Alaska, provides:

> "Sec. 1349. When objections are made to the claim for costs and disbursements, the Clerk shall forthwith pass upon the same, and indorse upon the verified statement, or append thereto, the charges allowed or disallowed. Any person aggrieved by the decision of the Clerk in the allowance of costs or disbursements may appeal from such decision to the Court within five days from the date of such decision, by serving a notice of such appeal, and in what particulars, upon the adverse party or his attorney, which appeal shall be heard and determined by such Court, or judge thereof, as soon thereafter as convenient."

The verdict was returned March 18, 1918 (Tr. p. 133). The judgment was entered March 25, 1918 (Tr. p. 136). The cost bill was filed March 25, 1918 (Tr. p. 139). The objection to the cost bill was filed April 1, 1918 (Tr. p. 137), within two days after the five days allowed for filing the cost bill by Section 1348. On the next day, April 2, 1918, the Clerk taxed the costs as asked by the judgment creditor (Tr. p. 139). On the 2nd of April, 1918, after the time for filing objections had

expired, and unbeknown to judgment debtors, so far as the records show, the Marshal filed a certificate stating that the Marshal's fee for serving attachment was $96.17, keeper's fee, $970.00; total $1066.17.

This is an amendment of the original cost bill after the time for filing the cost bill had expired, and even after the time for filing objection to the cost bill had expired.

Moreover, this certificate shows that none of the Marshal's fees were legally taxable as part of the personal judgment, but could be deducted only from the proceeds of the property attached. If these proceeds were not enough to pay the expenses of the attachment, those expenses should not be made a part of the personal judgment.

If the original bill of costs was defective, the judgment creditor had the right to move for an order allowing him to amend.

Willis v. Lance, 43 Pac. 384.

But this was not done. These amendments should, therefore, have been disregarded by the Clerk.

The judgment debtors in due time appeal to the Court (Tr. pp. 124 and 140).

Thereafter, and on the 3rd day of April, 1918, the appeal was submitted to the Court (Tr. p. 124). The next day the Court directed the plaintiff (de-

fendant in error) to file a certified statement of the Marshal's fees taxed by the Clerk (Tr. p. 124). This was done the same day and the taxation by the Clerk was affirmed (Tr. pp. 124, 141).

The itemized statement by the Marshal called for by the Court showed each item of expense (Tr. p. 143). This shows that the Marshal's fees objected to are not properly taxable as part of the personal judgment but are expenses connected with the keeping of the attached property and can be charged only against the proceeds of the property attached.

Moreover, it was too late for defendant in error to amend the cost bill after an appeal had been taken.

It would seem reasonable that if the Marshal spends, at the instance of plaintiff in action, more money in keeping the property than the property is worth, the judgment debtor should not be held personally for this expenditure. Yet, if the property attached had brought nothing at the sale, or had been lost, the defendants below under the rule applied in this case would nevertheless suffer a personal judgment against them for this expense.

The better rule would seem to be that the Marshal's expense be paid out of the proceeds of the property, the same as is the case in execution.

—F—

CONCLUSION

If the Government scale had been admitted, there would have been evidence that there was no balance in favor of defendant in error. The same evidence which thus would have defeated recovery under the allegations in the complaint would also have sustained the allegations in the first and third counter-claims.

Inasmuch as no controversy has arisen over the special verdict under the second, fourth and fifth counter-claims, that verdict should be allowed to stand and new trial should be ordered of the issues formed by the complaint and answer and by the first and third counter-claims and the reply. All of which is respectfully submitted,

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